IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1179

LAWRENCE J. STOCKLER, on his own behalf and on behalf of those similarly situated,

Appellant,

vs.

STATE OF MICHIGAN, DEPARTMENT OF TREASURY and STATE TREASURER,

Appellees.

On Appeal from the Supreme Court of the State of Michigan

MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, Appellees move that Appellant's appeal from the Opinion of the Michigan Court of Appeals (JS 2a-14a)[1] and from an Order of the Michigan Supreme Court denying leave to appeal, entered November 23, 1977 (JS 1a-2a), be dismissed on the following grounds:

1. That the appeal does not present a substantial federal question; and

2. That the Opinion of the Michigan Court of Appeals is conclusive.

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[1] Unless otherwise indicated, numbers in parentheses preceded by "JS" will refer to pages of Appellant's Jurisdictional Statement.

In the alternative, Appellees move that the Opinion be affirmed on the grounds that it is manifest that the question on which the decision of this cause depends is so insubstantial as to need no further argument.

I.

THE STATE STATUTORY PROVISION INVOLVED AND THE NATURE OF THE CASE.

A. The State Statutory Provision.

The sole issue presented by this appeal is whether a tax upon the privilege of doing business, imposed upon every person with business activity within the state of Michigan, abrogates any constitutional right protected by the Federal Constitution, and particularly the Fifth, Ninth, Tenth or Fourteenth Amendments thereof.

Effective January 1, 1976, Michigan drastically altered its method of taxing business by levying a "single business tax," being Act No. 228 of the Michigan Public Acts of 1975.[2] This new tax replaced the income tax on corporations and financial institutions levied theretofore pursuant to 1967 PA 281;[3] the franchise tax, previously levied under 1921 PA 85;[4] the intangibles tax on corporations and other business entities, imposed theretofore by 1939 PA 301;[5] the tax on

[2]
1975 PA 228, as amended by 1976 PA 389; MCLA 208.1 et seq.; MSA 7.558(1) et seq.

[3]
1975 PA 233; MCLA 206.1 et seq.; MSA 7.557(101) et seq.

[4]
1975 PA 230; MCLA 450.301 et seq.; MSA 21.201 et seq.

[5]
1975 PA 229; MCLA 205.131 et seq.; MSA 7.556(1) et seq.

capital and reserves of savings and loan associations, imposed by 1964 PA 156, § 442;[6] the privilege tax on domestic insurers, imposed by 1956 PA 218, §§ 448, 449;[7] the property tax upon business inventories, imposed by 1893 PA 206;[8] and the tax upon materials and supplies of public utilities, imposed by 1905 PA 282.[9]

B. The Proceedings Below.

Appellant brought suit in the Circuit Court for the County of Wayne, State of Michigan challenging the single business tax as being violative of the Fifth, Ninth, Tenth, and Fourteenth Amendments. Appellant contended that he has a fundamental right to engage in business activity and that the single business tax is an unconstitutional tax on that right. The Circuit Court granted the Appellees' Motion for Summary Judgment and held that the statute was constitutional.

On appeal the Michigan Court of Appeals affirmed, and the Michigan Supreme Court denied leave to appeal from the opinion and order of the Michigan Court of Appeals.

[6]
1975 PA 231; MCLA 489.842; MSA 23.540(442).

[7]
1975 PA 232; MCLA 500.448, 500.449; MSA 24.1448, 24.1449.

[8]
1975 PA 234; MCLA 211.1 et seq.; MSA 7.1 et seq.

[9]
1975 PA 235; MCLA 207.1 et seq.; MSA 7.251 et seq.

II.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION

As noted by the Michigan Court of Appeals (JS 3a-4a), the single business tax

> "° ° ° has been analyzed as a 'pseudo' value added tax in that it taxes what one has added to the economy in contrast to an income tax which taxes what one has derived from the economy. ° ° ° The act provides for a 'specific tax of 2.35% upon the adjusted tax base of every person with business activity in this state which is allocated or apportioned to this state.' MCLA 208.31(1); MSA 7.558(31)(1). In short, the tax base is determined by adding back to federal taxable income certain items previously deducted, for example, wages paid and interest paid, and then subtracting certain items included in federal taxable income, for example, interest and dividends received. MCLA 208.9; MSA 7.558(9). Certain deductions and exemptions are then subtracted to determine the adjusted tax base. MCLA 208.23; MSA 7.558(23), MCLA 208.35; MSA 7.558(35)."

To emphasize the distinct character of the new tax and to contrast it with an income tax, the Michigan legislature provided:

> "The tax so levied and imposed is upon the privilege of doing business and not upon income."[10]

Appellant postulates that the single business tax, like those

[10]
MCLA 208.31(4); MSA 7.558(31)(4).

struck down in *Murdock*, *Grosjean* and *Harper*,[11] burdens appellant's rights to engage in business as protected by the Fifth and Fourteenth Amendments. (JS 22)

That postulate clearly misconceives the exactions involved in the cited cases and the scope of the decisions. *Murdock* dealt with a municipal license tax, the payment of which was a condition to the exercise of religious activities. *Grosjean* struck down a gross receipts tax for the privilege of selling advertising to be printed or published in magazines and newspapers as being an infringement of free speech. *Harper* declared that a state poll tax unconstitutionally conditioned the right to vote.

The Michigan single business tax bears no resemblance to the exactions found to impair religious liberty, free speech, and the elective franchise, respectively. It is a tax upon the "doing of business" imposed upon all persons with business activities within the state. As noted herein on p 2, it replaced a variety of state taxes theretofore imposed upon business and is the state's major business exaction.

In *Grosjean, supra,* at 297 US 233, 250, this Court carefully sought to delineate the scope of its decision by stating the following:

> "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one

[11]
Murdock v *Pennsylvania,* 319 US 105; 63 S Ct 870; 87 L ed 1292 (1943); *Grosjean* v *American Press Co,* 297 US 233; 56 S Ct 444; 80 L ed 660 (1936); and *Harper* v *Virginia Board of Elections,* 383 US 663; 86 S Ct 1079; 16 L ed 2d 169 (1966).

single in kind, with a long history of hostile misuse against the freedom of the press."

Thus, tested against *Grosjean, supra*, the federal income tax or the Michigan single business tax, both "ordinary forms of taxation for support of the government," may be imposed upon owners of newspapers. They clearly do not abridge any right protected by the Fifth or the Fourteenth Amendments.

Appellant takes umbrage with the legislative declaration that the single business tax is imposed upon the privilege of doing business and not upon income. "Privileges," he says, may be taxed, but "rights" are "not subject to the taxing powers of the state" (JS 18). A similar argument was rejected by Mr. Justice Cardozo in *Steward Machine Co v Davis*, 301 US 548, 580-581:[12]

> "• • • We learn that employment for lawful gain is a 'natural' or 'inherent' or 'inalienable' right, and not a 'privilege' at all. But natural rights, so called, are as much subject to taxation as rights of less importance. An excise is not limited to vocations or activities that may be prohibited altogether. It is not limited to those that are the outcome of a franchise. It extends to vocations or activities pursued as of common right. What the individual does in the operation of a business is amenable to taxation just as much as what he owns, at all events if the classification is not tyrannical or arbitrary." Footnote omitted.

In a like vein, Mr. Justice Stone, in *Carmichael* v *Southern Coal & Coke Co*, 301 US 495, at 508,[13] declared:

[12] 81 L ed 1279, 1287; 57 S Ct 883 (1937).

[13] 81 L Ed 1245; 57 S Ct 868 (1937).

> "Taxes, which are but the means of distributing the burden of the cost of government, are commonly levied on property or its use, but they may likewise be laid on the exercise of personal rights and privileges. • • •"

The error of appellant's argument is illustrated by its syllogistic presentation:

> *Major premise*: The "doing of business" is the exercise of a constitutional, i.e., natural, inherent, inalienable and sacred right, which the United States Constitution immunizes from ordinary and general taxation.
>
> *Minor premise*: Michigan's single business tax is imposed upon the privilege of doing business.
>
> *Conclusion*: The single business tax abrogates the constitutional immunity and should be struck down.

The major premise is unsupported by and misconstrues decisions of this Court. Appellant's conclusion falls with the premise.

The Jurisdictional Statement does not present any substantial federal question. It is so wanting in substance, in view of previous decisions of this Court sanctioning taxation for the privilege of doing business and, indeed, "ordinary forms of taxation for support of the government" upon "natural rights," as not to need further argument.

III.

CONCLUSION

WHEREFORE, Appellees respectfully submit that the question upon which this cause depends is so unsubstantial as not to need further argument, and Appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the order entered in the cause by the Supreme Court of the State of Michigan.

Respectfully submitted,

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